XpertHR Podcast: Are you at risk of backdated holiday claims?

Original XpertHR podcast: 9th February 2018

Laura Merrylees: Hello and welcome to this XpertHR podcast with me, Laura Merrylees.

A recent decision of the European Court of Justice has sent alarm bells ringing among employers, as it has opened up the prospect of holiday pay claims being brought by workers who had otherwise been regarded as self-employed.

Joining me on the phone to discuss what this decision means for employers is Nick Chronias, who's a partner at DAC Beachcroft and a contributing author to XpertHR. Morning Nick. [0:00:43.6]

Nick Chronias: Good morning Laura.

Laura Merrylees: So Nick, fill us in if you will, please, on the background to this case. [0:00:48.0]

Nick Chronias: So this case concerns a Mr King, and he for thirteen years worked for a business called Sash Windows on a self-employed, commission-only basis. Mr King actually was, about three years before he stopped working for Sash Windows, given the chance to go onto an employed basis contract but chose to stay on a self-employed basis. But when he left the business he then brought a claim saying that he hadn't received holiday pay and he should have done, because whilst he was described as self-employed he was actually a worker under the law, and he said that he was entitled to all thirteen years of holiday pay which he hadn't received because as a commission-only person he didn't actually receive any money when he took any holiday. So that holiday that he did take was unpaid.

Laura Merrylees: Okay, and what was the ECJ's decision in the case? [0:01:41.0]

Nick Chronias: They upheld Mr King's complaint and upheld it in very strong terms. The main things that they said were, first of all, that the right to take holiday and to be paid for it is basically two sides of the same coin, and so you cannot have one without the other. The ECJ said that is a fundamental and very important right that relates to health and safety, and that any restriction of it or denial of it needs to be dealt with very seriously and a very purposive construction taken to the Working Time Directive to ensure that those rights are respected.

And in Mr King's case, that meant first of all that the fact that both parties had characterised this relationship as self-employed did not matter. It was for Sash Windows to advise itself as to whether he was truly self-employed or not. The fact that it was argued by Sash Windows that he had to take the leave and then make the claim year on year, that argument was rejected on

the basis that this is a fundamental right, and basically without him having both sides of the coin he was being denied his right.

And very importantly the ECJ also said that it would deny him an effective right if, in circumstances where he simply was denied the right absolutely, he wasn't entitled to go back over those thirteen years and claim for unpaid holiday for that entire period of time. And what they said was any national laws that would restrict that ability to go back those thirteen years would be incompatible with working time laws. What they basically said is as far as they were concerned under the Working Time Directive, he should have the right to claim for any unpaid holiday for that four-week period that is ring-fenced by the Working Time Directive, going back to right when he started with Sash Windows, so for the whole thirteen-year period.

Laura Merrylees: Okay, so the ECJ has given its decision and, as you say, has made it clear that workers must be able to carry over unused holiday, regardless of whether they have – up until that point – been labelled or treated as self-employed. But is the decision binding on UK courts? [0:0:03:58.1]

Nick Chronias: It's not Laura. It's persuasive but it's not binding.

Laura Merrylees: Okay, so what happens to the case now then? [0:04:03.7]

Nick Chronias: The case is going to go back to the Court of Appeal (it's listed for the 20th and 21st November as we understand it) for the Court of Appeal to consider whether our law can be read compatibly with European law, with the ECJ's decision, and if it can, then obviously it can make a decision that will be consistent with the ECJ's decision. If it can't, then that throws up an issue of whether our legislation will need to change to bring it into line with European law. But I think it's quite likely that the court will say that with some adjustments, our law can be read compatibly with the ECJ's decision. But that'll be something for the Court of Appeal to decide.

Laura Merrylees: Yeah. So nevertheless, employers really need to be looking at this now as something that could well impact, and have it in mind that that's the case. But we'll obviously be keeping a close eye on the progress of that case as it goes to appeal, as we understand it towards the end of this year. [0:05:01.1]

Nick Chronias: That's right.

Laura Merrylees: Now this decision, does it have any wider implications or does it only apply to the complete denial of the right to take leave and be paid for it where worker status has been denied? [0:05:12.8]

Nick Chronias: That is the question that I think our courts are going to have to decide. But let me break down that answer in some more detail.

So first of all our Court of Appeal will have to decide whether our law can be read compatibly with the way that the ECJ has read the Working Time Directive. In doing that, they've got a very clear steer from the ECJ that this is a case about a complete denial of the right, not situations where there's an argument over the amount of money that the person should be paid, or what might be described as a partial denial.

So for example, in the situation of sickness absence – so where someone hasn't taken their leave due to sickness – the ECJ has made absolutely

clear that this case doesn't apply in that situation and the case law that says that you can only go back fifteen months in that situation still holds good.

Now if that principle is right – and I'm clear that it is – then other instances where the person has had an absence and so been unable to take their leave should be treated in a similar way to sickness and you shouldn't have that long backdating. So for example where you've taken a period of maternity leave. I think the same limitations should apply.

So on the face of it this should be about – and the implications should be about – complete denials, specifically in the situation where a person has been treated as self-employed and then later a court or tribunal has said they shouldn't have been and they were a worker or they were an employee.

There may be shades of grey here. So for example I had a situation where we were looking at a position where individuals were allowed to bank holiday pay but they then had to draw it down. So unless they specifically drew down the holiday pay then they would be unpaid for it, but the money was there available for them to draw down. That might be a bit more of a grey situation as to whether it comes into the denial category or the partial denial or 'you can't take it because of some other absence meaning that you can't take holiday.' There may be these subtleties but I do think there's a clear line to be drawn between the denial and the 'absence caused by another reason' situation.

Laura Merrylees: Okay, so where we've got the absence caused by another reason, there may be some comfort there for employers, within your view, that the exposure could be limited to say, as you mentioned, the sort of fifteen months or so, but where we have the complete denial of the right and the person just simply hasn't been regarded as a worker for however many years that goes back, then the potential exposure is there for employers and they need to be aware of that? [0:08:01.8]

Nick Chronias: Yes.

Laura Merrylees: So given where we are not with this decision – and as we say, it's an ECJ decision and we'll have to see what approach is taken within the UK when it goes back to the Court of Appeal – but given where we are with it and the concerns that it will raise for many of our listeners, are there any practical steps, Nick, that our listeners can take to mitigate the risk of claims being brought? [0:08:20.4]

Nick Chronias: I think let's take the situation of the organisation that engages people on a self-employed basis, which has obviously been very much in the public domain with a number of high-profile decisions in the Taylor Review.

For those organisations I think there's the practical step of looking at the way in which they engage people and against the case law what their risk profile is of those individuals being declared to be workers or employees. And a number of those organisations are looking at potentially drawing a bright line between where they are now and putting in place future terms that either make it much clearer that there is a true self-employed relationship – they put them on different terms where they can be more confident that none of these worker rights would apply – or do the opposite, where they accept that because of the risk they are going to bring the relationship on a different footing and accept that they are workers and

accept that they're entitled to holiday pay under the Working Time Regulation.

And obviously where they can draw that bright line and show that they're doing something different, what they're seeking to do is insulating them against backdated claim, either on the basis that for the future there is no right, or in the future there is a right and they're accepting it and they're going to pay for it. So that's absolutely a step that can be taken by those that I think are most directly affected by the Sash Windows decision.

For those who are engaging people and accepting that they're workers or employees, my own view is that they are still perfectly entitled to maintain the position that the Bear Scotland decision (which obviously referred to the three-month time limit on bringing unlawful deductions claims and also the deduction from wages limitation regulations) still apply, so there can't be this long backdating that is suggested by the ECJ in the Sash Windows case.

And it's worth remembering for your listeners – and I think this is important – that this decision in Sash Windows was about a claim brought under the Working Time Regulation, not under our unlawful deduction legal regime. So again there's a perfectly good argument that our regime and the Bear Scotland decision that limits the amount of backdating that you can claim by way of an unlawful deduction claim hasn't been touched by this decision. But I need to be fair and say that obviously that is going to be the subject of further challenge and there are certainly other commentators that have put forward a different view and may be looking for cases to bring to challenge that viewpoint that I've just given.

Laura Merrylees: We have to accept that within this area at the moment there is limited certainty but some useful, practical pointers which, from what you're saying, will very much depend upon your own workforce setup, the business model that you have, the way that you engage people, and whether taking those steps makes sense for your organisation commercially and how risk-driven you want to be. [0:11:30.6]

Nick Chronias: Correct.

Laura Merrylees: So just a final thought from you, Nick. There seems to be no end to the stream of holiday pay cases recently. In fact, it was only a few months ago, wasn't it, that we were talking to you about the Dudley decision, which was around the inclusion of voluntary overtime and holiday pay. Is there anything else around the corner that you know of? [0:11:48.5]

Nick Chronias: So I still think there are a number of pay elements that we haven't dealt with yet. So particularly bonuses and pensions. Whilst I'm not aware of live cases at the moment there's certainly significant discussion about whether they will be the next territories that will be explored by employees, particularly where, for example, a bonus payment isn't included within a holiday pay calculation for them.

Laura Merrylees: And is there anything practically that employers can do at this stage to anticipate that? Do you see that as a risk that employers should be trying to sort of have in mind as they deal with their bonus schemes and their pension payments at the moment, or is it just an area really to watch this space and see what develops? [0:12:33.2]

Nick Chronias: There is something that practically employers can do but it may be very unattractive for them. So I think that there is a very legitimate argument that only bonuses that are related to an individual's performance are in scope, based on the earlier ECJ decisions that link the entitlement to holiday pay to the individual's performance of duties that are related to his or her ordinary pay and ordinary tasks.

So if there's a bonus scheme that is about the organisation's financial performance or team performance, I think they're out of scope. But I appreciate for lots of employers the whole purpose of a bonus scheme is to incentivise the individual, so simply saying, 'Make bonus arrangements more team-related,' isn't necessarily going to be an answer for them.

And then I think the other practical thing which isn't necessarily a legal safeguard but is a practical one, is to be very clear with employees that bonuses can still be earned whilst performing the full range of the person's duties and that the bonus targets are specifically set with the holiday periods in mind so that there's no question that the person can take his or her holiday and still be able to achieve the targets and then trigger the bonuses.

Laura Merrylees: So perhaps some tweaks and some interesting thoughts and something to have in mind, but as you say, you've got to look at what's the purpose that drives your bonus scheme in the first place, and does the risk of trying to box off a potential holiday claim justify making quite potentially radical changes to that scheme that just may not suit the organisation in many other ways.

Okay, so perhaps a bit of a reprieve on the horizon in terms of any other cases coming up imminently but we'll have to wait and see because it is a very active space at the moment in terms of holiday pay claims.

So thank you very much for joining us today, Nick.

Nick Chronias: Thank you very much, Laura.

Laura Merrylees: Now if you want to delve deeper into the on-going saga of holiday pay we have plenty of guidance on the site, including a case report on the Sash Window decision, in our Law Reports tool, and also a dedicated section on holiday pay in the *Employment Law Manual.* Thanks very much for listening and we look forward to you joining us next time.